U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 06 2006
WAC 05 044 50505

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner is a research laboratory that seeks to employ the beneficiary as its executive vice president for research and development. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director found that the petitioner qualifies as a member of the professions holding an advanced degree. The petitioner had requested to classify the beneficiary as an alien of exceptional ability in the sciences, but there is no practical difference between the two classifications in terms of immigration benefits. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel states that the beneficiary "is internationally recognized as an extraordinary scientist in the specialty of HIV/AIDS research, specifically for his invention and development of an HIV treatment, Thymus Nuclear Protein (TNP), which is presently exhibiting strong test results around the world." Counsel also contends that the beneficiary "is a highly acclaimed scientist and researcher who has established his reputation as one of the top experts in the world in the research, development, and technology of preparing an anti-AIDS treatment."

The director has not disputed the intrinsic merit or national scope of scientific research into treatments for HIV infection and AIDS, and therefore we need not discuss these aspects of the petitioner's claims here.

The petitioner submits a description of the petitioning company:

> [The petitioner] is a California-based corporation focused on developing a new breakthrough treatment for HIV/AIDS. [The petitioner's] core technology revolves around TNP – a biologically active linear protein fragment (peptide) extracted from juvenile bovine thymus that acts as an immune modulator.
>
> Preliminary clinical trials have shown that TNP holds great promise as a unique therapy to combat the worldwide AIDS epidemic. TNP has no significant side effects and there is evidence of strong - and long-lasting – activity against HIV. . . .

> [The petitioner] is now preparing to submit Investigational New Drug applications to the U.S. Food and Drug Administration and to the Canadian Ministry of Health. The company is confident that these trials will confirm the excellent safety and efficacy profiles, and exciting potential of TNP. . . .
>
> In addition to its great promise as a treatment for HIV/AIDS, modified forms of TNP may have other far reaching applications including but not limited to the treatment of: active herpes simplex and herpes genitalis; the treatment of other viral infections like hepatitis; and as a treatment to stimulate the immune system. . . .

In a letter dated August 10, 2004, [redacted] chairman, president and CEO of the petitioning company, discusses the beneficiary's work at the company:

> [The beneficiary], along with his late father . . . , is the co-discoverer and co-inventor of Thymus Nuclear Protein ("TNP"). He is one of only two individuals who possess the knowledge required to manufacture TNP and is therefore invaluable to us. He is also our lead research and development scientist, responsible for new drug candidate discovery and invention. . . .
>
> TNP . . . has proven to be a safe treatment with minimal side effects, and has shown the ability to create sustained reductions in viral infection levels at up to 9 months after treatment has stopped.
>
> The standard method of treatment for HIV infection is combination antiretroviral therapy. Upon cessation of combination therapy, it would be typical to see immediate increases in levels of HIV in the blood. The apparent ability of TNP to cause decreases in viral load after treatment with TNP has stopped is therefore drastically unlike current forms of HIV treatment. While additional testing is certainly required, we believe that TNP holds great promise as a potential breakthrough in the treatment of HIV.
>
> [The petitioner] is now working towards filing an Investigational New Drug application with the U.S. Food and Drug Administration and we hope to begin a human clinical trial of TNP in the USA in late 2004 or early 2005. . . .
>
> We are likewise eager to further study the other therapeutic treatments under development by [the beneficiary] for other infectious diseases, and, clearly, his expertise in biochemistry represents a possible fountain of knowledge and potential medical breakthroughs. For example, [the beneficiary] is developing treatments for Multiple Sclerosis, Alzheimer's Disease and other conditions that are radically different from current treatments.

The petitioner submits documentation of the beneficiary's past participation in research, such as patent records, abstracts of conference presentations, published articles and internal reports of clinical studies. The petitioner also submits five witness letters. Two identical letters are signed by members of the petitioner's

Scientific and Medical Advisory Board. These letters deem the beneficiary to be "invaluable and, in fact, irreplaceable to his employer." [redacted], research assistant professor at the University of Arkansas for Medical Sciences, states that the beneficiary's "expertise in manufacturing TNP is critical to his employer." [redacted] Bouic of the University of Stellenbosch, South Africa, states that he is "most impressed and excited by the results obtained" in clinical trials of the beneficiary's "novel approach to the treatment of HIV infected patients." The final letter is an electronic mail message from [redacted] whom the record identifies as the petitioner's vice president for Business and Corporate Development. Mr. [redacted] lists the beneficiary's research interests and duties at the petitioning company.

Given the above information, the petitioner's waiver claim appears to rest entirely, or nearly so, on the beneficiary's work with TNP.

On May 18, 2005, the director issued a request for evidence (RFE), instructing the petitioner to submit documentation to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director also requested letters from major governmental or academic institutions, addressing the issue of how the beneficiary, in particular, merits a national interest waiver.

In response, the petitioner submits copies of patent documents, published articles, and press releases relating to the beneficiary's work. These articles further document the nature of the beneficiary's work, but they do not inherently establish eligibility. The only article from a clearly independent source (*i.e.*, that does not originate from the petitioning company or its staff) is an article from the online publication *gay.com*, which reports that the petitioner's drug is promising but "not as potentially impressive as the French therapeutic vaccine, which produced a tenfold drop in viral load in 45% of subjects . . . after only one injection." The article contains speculation as to how the drug operates, and ands with the assertion that "these results warrant further investigation."

The petitioner also submits new letters. None of the letters are from entities that the director had identified in the RFE. [redacted], president of Search For A Cure, states that the beneficiary should remain in the United States because, if he were abroad, he would not have access to research facilities of comparable quality. [redacted] also states: "A recent community meeting of national leaders in San Diego concluded this therapeutic possibility needed to be tested as soon as humanly possible and the ability of [the beneficiary] to participate is a critical part of this effort."

[redacted] states that the beneficiary "today is the only person who knows how to manufacture TNP." [redacted] acknowledges that the beneficiary has not produced many scholarly articles, but he states: "We have on purpose tried to keep a low profile in the scientific world because we wanted to make sure that we established ourselves both scientifically and financially before any of these breakthroughs are announced because we felt we would be attacked by other drug companies and other scientists." [redacted] does not explain why the company anticipated being "attacked" in this way. We note that several of the petitioner's past press releases appear to have been geared more toward investors than the medical research community.

[redacted] of the Foundation for the Advancement of Health Sciences has signed a letter that consists, for the most part, of text taken directly from [redacted] first letter on the beneficiary's behalf.

Although [redacted] letter is dated August 2, 2005, it includes the assertion that "we hope to begin a human clinical trial of TNP in the USA in late 2004 or early 2005." As of mid-2005, [redacted] continues to assert that the petitioner is in the process of preparing materials for submission to the Food and Drug Administration.

The director denied the petition, stating: "The record does not establish the contributions of the beneficiary toward the discovery of TNP." The director noted that the beneficiary has sought to have his name retroactively added to patent documents, but the director also observed: "There is no evidence that this petition [to the U.S. Patent Office] has been approved." The director also concluded that the petitioner had not demonstrated that the beneficiary's participation in research would benefit the United States to a substantially greater extent than that of other qualified researchers in the field. The director also found that the evidence submitted in response to the RFE was not of the caliber requested.

On appeal, counsel states: "The decision seems to be based on the bene[ficiary]'s contribution to the isolation of TNP and that the record is not clear re[garding] his contribution." The petitioner submits copies of new patent documents, including the beneficiary's assertion that his name was inadvertently omitted from some earlier patent materials because he and his father/collaborator had similar names.

While the director did indicate that the record was not clear as to the extent of the beneficiary's contribution to the discovery and isolation of TNP, that was not the sole or primary basis for the denial. In the five-page denial decision, the director devoted only one paragraph to the issue. The director also indicated that, while HIV/AIDS research is clearly in the national interest, participation in such research is not automatic grounds for a national interest waiver, and that the petitioner had not provided adequate objective evidence that this particular beneficiary's work has been, and likely will continue to be, of substantially greater importance than that of other qualified researchers in the same field. Self-serving promotional materials from the petitioner cannot suffice in this regard.

In a letter submitted after the denial of the petition, United States Representative Bobby L. Rush states that the beneficiary and the petitioner "are on the verge of an important breakthrough in the treatment of HIV AIDS. . . . As attested to by some of the top HIV AIDS experts in the world, TNP is, 'unlike anything we have studied or read about, it holds great promise as a new means of HIV AIDS treatment.'" The quoted passage derives from identical form letters signed by members of the petitioner's Scientific and Medical Advisory Board.

Counsel argues that the beneficiary's "skills and knowledge outweigh the inherent national interest in protecting US workers through the labor certification process." This is a conclusion, rather than an argument supporting a conclusion. With regard to the labor certification process, we note that, in July 2006, the petitioner filed a new petition, receipt number LIN 06 222 50104, on the beneficiary's behalf. While the AAO is not in possession of the documents in this new petition, CIS records indicate that the petition was filed under a classification that requires an approved labor certification. Because the petitioner has successfully obtained an approved labor certification on behalf of the beneficiary, the waiver claim appears to be largely moot; in the present proceeding, the petitioner seeks to waive a requirement that has now been met.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the outcome of the subsequent petition filed by the petitioner discussed above.

ORDER: The appeal is dismissed.